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No. 03-1599

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CITY OF MESA,

Petitioner,

v.

CRAIG W. PETERSEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The "Question Presented" by Petititoner is wrong. It does not reflect the actual holding and reasoning of the Arizona Supreme Court. Petitioner therefore submits that the correct "Question Presented" is as follows:

> Did the Arizona Supreme Court correctly hold that the Fourth Amendment to the United States Constitution prohibits a city from imposing a random, suspicionless, warrantless drug testing program on its firefighters in the absence of any history or even rumor of drug abuse, and in the absence of the most immediate and compelling need, based on a clearly articulated, real and identifiable danger?

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INTRODUCTION

It may sound odd, but in many ways, it would be great for this Court to grant the Petition for Writ of Certiorari. First, this case represents an opportunity for this Court specifically to approve the Arizona Supreme Court's sound reasoning and solid result. Second, this case could serve as the foundation for a comprehensive opinion by this Court that will bring coherence and rationality to an unsettled area of constitutional law. Despite having written several Fourth Amendment opinions dealing with warrantless, suspicionless urinalysis testing programs, this Court has *still* not developed a widely-accepted, reliable and fair way to resolve such cases. The excellent dissents in several of this Court's urinalysis cases make that point very well, as do the remarkably divergent opinions of the lower courts, which are clearly struggling to interpret this Court's teachings – and are too often degrading the Fourth Amendment in the process.

The facts in the present case are as simple as any that have come before this Court in decades. The City of Mesa imposed a random, warrantless, suspicionless urinalysis program on an exemplary fire department with no history of drug abuse and no history of any drug-related incidents, injuries or accidents. The Arizona Supreme Court invalidated this random, suspicionless, warrantless drug testing program, in large part because the random, unexpected nature of this search and seizure program tipped the balance in favor of the firefighters' Fourth Amendment freedom from unreasonable governmental search and seizure. Simply stated, these firefighters are respected, adult professionals entitled to respect and privacy. If there was ever a case to draw a constitutional line on what the government can do – and cannot do – when it wants to seize and search the bodily

fluids of its adult, and presumptively innocent citizen-employees, this is the case.

The Arizona Supreme Court did well with this hard issue, although it would have been magnificent if it had gone even further in condemning this latest manifestation of the contemporary government penchant for using technology to invade the bodily privacy of those citizens who are also public employees. Privacy is far too easily lost, and, once lost, is seldom regained. However, as Justice Louis Brandeis (1856-1941) wrote in a prior time of national fear and hysteria:

> The makers of our Constitution . . . conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Olmstead v. United States, 277 U.S. 436, 478 (1928) (Brandeis, J., dissenting). Perhaps this case will help stem the rising tide of overzealous lower court cases threatening to demolish the right of privacy and dismantle the Fourth Amendment.

I. THE ARIZONA SUPREME COURT'S DECISION SETS A RATIONAL CONSTITUTIONAL STANDARD

The City of Mesa inexplicably contends there is "a consistent constitutional standard among the states and federal circuits" on the issue of random drug testing.

However, several eloquent lower court judicial opinions have expressly held that the warrantless, suspicionless urinalysis testing of municipal firefighters violates the Fourth Amendment's prohibition against unreasonable search and seizure. *See, e.g., Beattie v. City of St. Petersburg Beach*, 733 F. Supp. 1455, 1458 (M.D. Fla. 1990) ("The City's generalized fear that a drug problem will arise at some future time, without more, is insufficient to overcome even the lessened privacy interests of the fire fighters in this case.") and *Johnson v. City of Plainfield*, 731 F. Supp. 689, 690-91 (D.N.J. 1990) (City's "surprise urinalysis test" of its firefighters so violated their rights that it "should cause us to pause in the nationwide rush toward massive and mandatory drug testing."). Thus, in fact, among the lower courts there is no *consistent* constitutional standard in this area.

It is true that the Arizona Supreme Court's opinion directly conflicts with numerous opinions by federal circuit and federal district courts, and with some decisions by state appellate courts. That is an excellent reason to accept review of this matter, since what the Arizona Supreme Court has written is so radically different from the result one would expect from almost all other lower courts. Having said that, it is also true that the Arizona Supreme Court's opinion supports the Fourth Amendment and is in full harmony with the relevant opinions of the one Court that has the final say in the definitive interpretation of the United States Constitution – this Court. The Arizona Supreme Court's opinion shines so brilliantly precisely because its adherence to the fundamental values of the Fourth Amendment is now a rare jewel in the drug testing area.

Further, the Arizona Supreme Court's approach makes sense: A city cannot rationally impose a random, suspicionless, warrantless urinalysis testing program on its fire department if there is no history of drug abuse in that fire department. After all, why have such an intrusive program if there is no problem? The factor tipping the balance in favor of the privacy rights of the firefighters is the "random" aspect of the testing program, which imposes a tangible element of fear and apprehension (reminiscent of the apprehension and fear caused by the hated "general warrants" the British Empire used against its American colonists). The Arizona Supreme Court's approach is fair and reasonable. It balances the privacy rights of the firefighters against an utterly theoretical risk that a firefighter might possibly use an illegal drug that might cause on-the-job impairment at some unknowable future date, maybe.

Instead of accepting the Arizona Supreme Court's straightforward, consistent constitutional standard, the City of Mesa proposes jurisprudence by syllogism. The City of Mesa's underlying syllogism is this: (1) A firefighter occupies a "safety sensitive" position. (2) Any person in a "safety sensitive" position can be forced to submit to random, suspicionless, warrantless urinalysis testing. (3) Therefore, any City of Mesa firefighter can be forced to submit to random, suspicionless, warrantless urinalysis testing whenever the City of Mesa demands. The City of Mesa's sweeping syllogism fractures in light of this Court's drug testing opinions.

A. "Safety Sensitive" in the Context of Drug Testing.

In the context of subjecting adult government employees to urinalysis and drug testing with no warrant and no

individualized suspicion of drug abuse, this Court has only applied the "safety sensitive" analysis in two situations: (1) in the drug-law enforcement area, and (2) in the course of post-accident investigations. However, the City of Mesa's vision of the "safety sensitive" designation is so elastic that, with any imagination, it will encompass almost any employee. In fact, many lower courts have indiscriminately distorted the "safety sensitive" rubric, twisted it around "special needs" terminology, and transformed it into justification for testing the following persons, among others:

Airport mechanics. *Boesche v. Raleigh-Durham Airport Authority*, 432 S.E.2d 137 (N.C. App. 1993).

Construction and maintenance workers. *Smith v. Fresno Irrigation District*, 84 Cal. Rptr. 2d 775 (App. 1999).

Motor vehicle operators. *American Federation of Government Employees v. Skinner*, 885 F.2d 884 (D.C. Cir. 1989).

Race horse jockeys. *Dimeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991).

School janitors. *Aubrey v. School Board of Lafayette Parish*, 148 F.3d 559 (5th Cir. 1998).

School teachers. *Crager v. Board of Education of Knott County, Kentucky*, 313 F. Supp. 2d 690 (E.D. Ky. 2004).

Shuttle bus drivers. *National Treasury Employees Union v. Yeuttner*, 918 F.2d 968 (D.C. Cir. 1990).

Truck drivers. *International Brotherhood of Teamsters v. Department of Transportation*, 932 F.2d 1292 (9th Cir. 1991).

So far, this elastic list stretches from jockeys to janitors, with governmental inventiveness and judicial acquiescence the only limits to including all employees of every description. After all, if anyone actually or even potentially operating a motor vehicle is already included, not too many people are being left out. For instance, take a librarian stacking books on high shelves in the public library. If the books are shelved inexpertly, or a high ladder is used ineptly, heavy objects could plummet from on high, strike another employee or a library patron, and cause grievous harm. As our imaginations readily inform us, the "safety-sensitive" analysis is so malleable that it will consume the rule against warrantless searches – a rule embedded in the United States Constitution.

Indeed, things have gotten so out of control that a federal district court in Kentucky could recently blithely proclaim that: "There is no general Fourth Amendment prohibition against suspicionless and random drug testing." *Crager*, 313 F. Supp. 2d at 693. That pronouncement turns the United States Constitution upside down, because there is a clear prohibition in the Fourth Amendment against any warrantless government search and seizure made without probable cause ***and*** because this Court has ***never*** stated that suspicionless and random drug testing was per se valid and permissible under the Fourth Amendment. On the contrary,

this Court specifically held, *in a urinalysis case*, that the Fourth Amendment is a "general prohibition against nonconsensual, warrantless, and suspicionless searches." *Ferguson v. City of Charleston*, 532 U.S. 67, 86 (2001).

The astounding expansiveness and lackadaisical attitude displayed by the lower federal and state courts in this area started with a misunderstanding of the "safety sensitive" designation, which this Court first applied in the urinalysis and drug testing context in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). However, the U.S. Custom Service's drug testing program in *Von Raab* was "designed to prevent the promotion of drug users to sensitive positions as much as it [was] designed to detect those employees who use drugs." *Id.* at 674. This was not a "random" testing procedure: it only covered those employees who applied for promotion to positions involving interdiction of illegal drugs, requiring them to carry firearms or to handle classified materials.

In *Von Raab*, the term "sensitive" referred to higher-level, supervisory positions within the U.S. Customs Service, an agency charged with stopping the importation of illegal drugs into our nation. The testing targeted "Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty." *Id.* at 672. Because such employees – unlike "government employees in general" – were "employees involved in drug interdiction," it made sense to test them for illegal use of the drugs they were in direct contact with and which they were tasked with interdicting. *Id.*

In short, the "safety sensitive" analysis in *Von Raab* concerned a truly exceptional class of law enforcement

employees. As this Court emphasized, it was "readily apparent that the Government has a compelling interest in ensuring that front-line [drug] interdiction personnel are physically fit, and have unimpeachable integrity and judgment." *Id.* at 670. Very few other government employees, including the City of Mesa's firefighters, are armed "front-line [drug] interdiction personnel." It is a distortion of *Von Raab* to argue that firefighters occupy "safety sensitive positions," in the unique sense that *Von Raab* uses that specialized term.

Firefighters are not armed agents interdicting the importation of illegal drugs. Firefighters operate in a different environment entirely. Their work involves safety, but so do a host of other government jobs, from janitors waxing floors to clerks driving motor vehicles in heavy traffic to librarians stacking heavy books. Unlike customs enforcers, firefighters are not "often exposed to [the drug-smuggling] criminal element and to the controlled substances it seeks to smuggle into the country." *Id.* at 669. In the *Von Raab* sense, "safety" is clearly not the same as "safety sensitive." A general concern for "safety" alone does not justify random, suspicionless drug testing.

The dissents in *Von Raab* came from the intriguing combination of Justices Marshall, Scalia, Brennan and Stevens. In their brief dissent, Justices Brennan and Marshall observed that the "Court's abandonment of the Fourth Amendment's express requirement that searches of the person rest on probable cause is unprincipled and unjustifiable." *Id.* at 679-80. Justice Scalia's dissent, in which Justice Stevens joined, and with which Justice Marshall agreed, is one of the most eloquent statements of personal liberty in American legal history. It is the shame of the world that America's lower courts have apparently so seldom seen it.

Justice Scalia started with the unassailable premise that urinalysis testing is a Fourth Amendment "search particularly destructive of privacy and offensive to personal dignity." *Id.* at 680. For the first time, Justice Scalia wrote, this Court had sanctioned, with no warrant or individualized suspicion, a distasteful intrusion into the privacy of apparently law-abiding citizens. "Until today this Court had upheld a bodily search separate from arrest and without individualized suspicion of wrongdoing only with respect to prison inmates, relying upon the uniquely dangerous nature of that environment." *Id.* Because the facts in *Von Raab* demonstrated no actual or even likely "frequency of use nor connection to harm," the government's testing program was simply "a kind of immolation of privacy and human dignity in symbolic opposition to drug use." *Id.* at 681. Since the City of Mesa admits that there is no rumor of drug use, much less a history of drug use, its program is also merely a symbolic gesture designed to win public favor at the expense of the privacy rights of the firefighters and of the Fourth Amendment.

A generalized suspicion of wrongdoing that might theoretically be avoided by random urinalysis drug testing would reduce the Fourth Amendment to a "frail protection." *Id.* at 684. There was a real potential for overly-broad application of the majority's approach. Indeed, as Justice Scalia predicted, many lower courts are already inclined to approve random drug testing of practically all other government workers "whose work, if performed under the influence of drugs, may endanger others – automobile drivers, operators of other potentially dangerous equipment, construction workers, school crossing guards." *Id.* at 685. The next lurch down the slippery slope will naturally be to require random "similar testing of private citizens who use

dangerous instruments such as guns or cars, or who have access to classified information." *Id.* at 686. The price for a symbolic gesture is simply too great, as the City of Mesa's conduct shows once more:

> Those who lose because of the lack of understanding that begot the present exercise in symbolism are not just the Customs Service employees, whose dignity is thus offended, but all of us – who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content, and who become subject to the administration of federal officials whose respect for our privacy can hardly be greater than the small respect they have been taught to have for their own.

Id. at 687.

In short, the *Von Raab* case, as Justices Marshall, Scalia, Brennan and Stevens all cautioned, must be applied in a very restrictive manner. Having said that, there is one more limited sense in which this Court has used the term "safety sensitive" in relation to warrantless and suspicionless public employee drug testing. On the same day that *Von Raab* was decided, this Court also upheld the propriety of post-railway accident, mandatory urinalysis drug testing in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989). In that case, this Court found that post-railway accident testing was proper for railway employees doing "safety-sensitive tasks" such as those "engaged in handling orders concerning train movements, operating crews, and those engaged in the maintenance and repair of signal systems." *Id.* at 620.

Significantly, nowhere does *Skinner* sanction pre-accident, random, warrantless, suspicionless testing. The accident itself provides the suspicion and removes any randomness from the drug testing, which is tied to a specific event. The meaning of the term "safety-sensitive" in *Skinner* therefore cannot be divorced from its context, which is limited to post-accident scenarios. Indeed, in the present case, Respondent is not challenging the right of the City of Mesa to test firefighters after a work accident. That's fine. The *Skinner* approach to "safety sensitive" is thus not even an issue in this case.

However, no discussion of *Skinner* is complete without mentioning the astoundingly prescient dissent that Justices Marshall and Brennan wrote in an effort to limit the damage done by the majority opinion's assault on the Fourth Amendment. Both Justices were concerned that, as happened with the City of Mesa, the desire to combat a perceived present evil would erode the fundamental privacy rights of innocent citizens. Their words can scarcely be improved:

> Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great. History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. The World War II relocation-camp cases, and the Red Scare and the McCarthy-era internal subversion cases, are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.

Skinner, 489 U.S. at 635 (citations omitted).

The "mass toxicological testing of persons who have given no indication whatsoever of impairment," which is precisely what the City of Mesa wants to do, "ignores the text and doctrinal history of the Fourth Amendment, which require that highly intrusive searches of this type be based on probable cause, not on the evanescent cost-benefit calculations of agencies or judges." *Id.* at 635-36. "The majority's acceptance of dragnet blood and urine testing ensures that the first, and worst, casualty of the war on drugs will be the precious liberties of our citizens." *Id.* at 636. This justified criticism of the *Skinner* majority opinion applies with far greater force to the City of Mesa's random, suspicionless testing program, which is not based in any way on any event generating any conceivable level of suspicion, such as an accident.

The penultimate paragraph of the dissent in *Skinner* is an extended and particularly apt quotation of a perceptive passage written by one of our finest American jurists, Justice Oliver Wendell Holmes, Jr. (1841-1935):

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Securities Co. v. United States, 193 U.S. 197, 400-401 (1904).

The present case is a chance to make reasonable law – not great law. This Court has, in highly limited circumstances, made statements that lower courts have misconstrued as permission to dismantle the Fourth Amendment. Instead of protecting the privacy rights of public employees, lower courts have often held that the government may require random, suspicionless urinalysis testing of any government worker whose job involves "safety." That was not something that even the majority opinions in *Von Raab* or *Skinner* would contemplate.

It is time for this Court to clarify that the Fourth Amendment is still a bar against random searches as pernicious as the arbitrary "general warrants" that the minions of George III (1738-1820) inflicted on his American colonists.

> General warrants, known as writs of assistance in colonial America, granted officers of the English Crown blanket authorization to search wherever they pleased for goods imported in violation of British tax laws. [*Stanford v. Texas*, 379 U.S. 476, 481 (1965).] The Supreme Court explained that, "They were denounced by James Otis [1725-1783] as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' because they placed 'the liberty of every man in the hands of every petty officer.'" *Id.*

United States v. Bridges, 344 F.3d 1010, 1014 n.1 (9th Cir. 2003). Indeed, it is "familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated

the framing and adoption of the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 583 (1980).

"For most of our constitutional history," therefore, "mass, suspicionless searches have been generally considered *per se* unreasonable within the meaning of the Fourth Amendment." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 667 (1995) (O'Connor, J. dissenting). Were George III alive today, and in his right mind for once, he would surely be amused and astounded at the spectacle of the descendants of his presumptuous, liberty-loving American colonists officiously imposing general warrants on their fellow citizens.

B. The Lack of any History – or Even Rumor – of Drug Abuse.

The record in this case proves there is not even a hint of a rumor of any drug abuse by members of the Mesa Fire Department, much less any history of such an unfortunate problem. Although they may not have been entirely accurate or wise, the majority opinions in *Von Raab* and *Skinner* were based on the premise that there was a concrete, identifiable problem that needed to be addressed and corrected by the suspicionless, warrantless extraction and testing of bodily fluids. The present case is an instance where the complete lack of any history of drug misuse will not support circumvention of the Fourth Amendment.

Naturally, in a case such as this, there is no "special need" to invade the privacy rights of the firefighters and conduct compelled extraction and testing of their personal bodily fluids. Sadly, in the lower courts' "surreal world of special needs, any fact can be twisted to fit the desired result without regard for Fourth Amendment mainstays." George M. Dery

III, *Are Politicians More Deserving of Privacy than Schoolchildren? How Chandler v. Miller Exposed the Absurdities of Fourth Amendment "Special Needs" Balancing*, 40 Ariz. L. Rev. 73 (Spring 1998). American lower courts have repeatedly found "special needs" justifying random, warrantless, suspicionless urinalysis testing, despite the lack of any foundation for such searches and seizures in this Court's jurisprudence. Indeed, since "the federal courts have entered upon the enterprise of balancing the privacy of workers against the 'need' for testing, more and more citizens have become subject to the escorted trip to the bathroom." *International Brotherhood of Electrical Workers, Local 1245 v. U.S. Nuclear Regulatory Commission*, 966 F.2d 521, 527 (9th Cir. 1992) (Fernandez, C.J., concurring).

In point of fact, there are ***only two cases*** in which this Court has upheld the ***random***, compelled extraction and testing of bodily fluids, and ***both*** of those cases involved the amazingly restricted constitutional and privacy rights of high school students, persons with a recognized unique status in the laws and traditions of our nation. "From the earliest days of the common law, public school students have lacked fundamental rights, even the right of liberty in its narrowest sense." James M. McCray, *Urine Trouble! Extending Constitutionality to Mandatory Suspicionless Drug Testing of Students in Extracurricular Activities*, 53 Vand. L. Rev. 387, 388 (2000).

In the first such random urinalysis case, *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995), this Court sanctioned the testing of high school students participating in interscholastic athletics. In the second case, *Board of Education of Independent School Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002), this

Court upheld the random urinalysis testing of high school students participating in competitive extracurricular activities. At the heart of both cases, the "special need" of fighting ***documented*** drug abuse among minor children entrusted to the care of the government was held strong enough to infringe on these children's already almost non-existent protections against search and seizure while on school grounds or engaged in school activities. Concisely stated, "Fourth Amendment rights . . . are different in public schools than elsewhere." *Vernonia*, 515 U.S. at 656. "In particular, a finding of individualized suspicion may not be necessary when a school conducts drug testing." *Earls*, 536 U.S. at 830.

That does not mean that *Earls* or *Vernonia* were necessarily correctly decided. After all, as Justice O'Connor reminded us in her sterling dissent in *Earls*, because our schools "are educating the young for citizenship," that is "reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Earls*, 536 U.S. at 855 (O'Connor, J., dissenting) (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943)). *Vernonia* and *Earls* did not, unfortunately, provide scrupulous protection of American students' constitutional freedoms.

However, even in the drug-testing cases involving minor students, this Court was careful to explain that there was no general or overall relaxation of Fourth Amendment privacy rights in other areas: "We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts." *Vernonia,* 515 U.S. at 665.

Here, of course, the context is a fire department with no hint or history of drug abuse, staffed by respected, honored and superbly-trained professionals. School children may expect to be imposed upon by their schools almost as much as they are imposed upon by their parents. That is a part of their unique status. It is one of the great benefits, and one of the most uncomfortable drawbacks – from the minor's immature and limited perspective – of being a minor.

A case that dramatically supports the Arizona Supreme Court's approach to random, suspicionless, warrantless drug testing is *Chandler v. Miller*, 520 U.S. 305 (1997). In that case, the Georgia Legislature passed a law requiring candidates for certain state offices to certify that they had taken a urinalysis drug test within thirty days before qualifying for nomination or election and that the test result was negative. A jaded view of recent American political history might suggest that political candidates would be a group where random drug testing could yield some surprisingly positive results, depending on how one defines the word "positive." However, this Court was not even slightly amused at the startling prospect of suspicionless drug testing of political candidates. Writing the strong 8-1 majority opinion, Justice Ginsburg soundly condemned the Georgia scheme.

As in our case, in *Chandler* there was ***no*** "record of drug abuse by" the persons that the government wanted to subject to warrantless and suspicionless searches. *Id.* at 311. Justice Ginsburg started her analysis by noting that the Fourth Amendment's "restraint on government conduct generally bars officials from undertaking a search or seizure absent individualized suspicion." *Id.* at 308. While she recognized that there was some "limited circumstances" where a search

might be conducted without individualized suspicion, the Georgia scheme did "not fit within the closely guarded category of constitutionally permissible suspicionless searches." *Id.* Justice Ginsburg acknowledged that the urine collection and testing program, although conducted in a polite manner moderately respectful of the privacy of those being tested, constituted a search under the Fourth Amendment. The question, then, was the reasonableness of the search.

Ordinarily, according to Justice Ginsburg, a search is only reasonable under the Fourth Amendment if it is "based on individualized suspicion of wrongdoing." *Id.* at 313. However, in a few instances "special needs" – other than the detection of crime – might justify failure to follow the Fourth Amendment. In such cases, "courts undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Id.* at 314. However, even when conducting such a balancing test, "the proffered special need for drug testing must be substantial – important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Id.* at 318. In *Chandler*, however – as in the case of the City of Mesa's firefighters – there was no "indication of a concrete danger demanding departure from the Fourth Amendment's main rule," and nothing in the record even hinting that the "hazards" that the government had broadly described were "real and not simply hypothetical." *Id.* at 319.

While a "demonstrated problem of drug abuse" might not be needed to support "the testing regime" in all cases, it would certainly "shore up as assertion of a special need for a suspicionless general search program. Proof of unlawful drug use may help to clarify – and to substantiate – the precise

hazards posed by such use." *Id.* at 319. However, a suspicionless, symbolic testing program that largely seeks "to set a good example" by testing public officials is insufficient to overcome the Fourth Amendment's protections. *Id.* at 321-22.

Significantly, in her analysis, Justice Ginsburg quoted momentous passages from the passionate 1928 *Olmstead* dissent of Justice Louis Brandeis (1856-1941):

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . [I]t is . . . immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Chandler, 520 U.S. at 322 (quoting *United States v. Olmstead*, 277 U.S. 438, 479, 485 (1928) (Brandeis, J., dissenting)).

"However well meant," as Justice Ginsburg wrote, the drug testing system imposed by the government in *Chandler*, diminished "personal privacy for a symbol's sake. The Fourth Amendment shields society against that state action." *Chandler*, 520 U.S. at 322. Of course, "where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk" could be reasonable, as "for example, searches now routine at airports and at

entrances to courts and other official buildings. But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged." *Id.* at 323.

Here, public safety in Mesa, Arizona is not "genuinely in jeopardy," nor is there any "substantial and real" risk to public safety that would justify "blanket suspicionless searches" like those imposed at airports and some public buildings. On the contrary, the only real and substantial risk here is trampling on the privacy rights and liberty interests of the City of Mesa's firefighters.

It is fair to read *Chandler* as imposing strict limitations on the ability of the government to require random, suspicionless, warrantless drug testing of adults. Chief Justice Rehnquist, the sole dissenter in *Chandler*, certainly appears to have thought that *Chandler* was far too restrictive on the government. According to the Chief Justice, if "in fact preventing persons who use illegal drugs from concealing that fact from the public is a legitimate government interest," then prior cases such as *Von Raab* and *Skinner*, "indicate that the government may require a drug test." *Chandler*, 520 U.S. at 326. In his penultimate sentence, Chief Justice Rehnquist concludes: "Nothing in the Fourth Amendment or in any other part of the Constitution prevents a State from enacting a statute whose principal vice is that it may seem misguided or even silly to the Members of this Court." *Id.* at 328. In the present case, the City of Mesa's drug testing program is as misguided and as far out of constitutional bounds as the State of Georgia's program in *Chandler*.

As an afterword on the history of drug abuse problem, the City of Mesa argues that the Arizona Supreme Court's

approach is unworkable, because there is no way to determine what sort of "history" of drug abuse is adequate to support random, suspicionless, warrantless drug testing. This contention is poorly taken for at least two reasons. First, it is a given in the present case that there is no rumor or hint of drug abuse. Those are the facts we have to work with. Establishing a workable and just constitutional standard here is therefore not hard under the present uncluttered facts. Second, asking how much drug abuse is enough to permit random, suspicionless, warrantless drug testing is as profitable as asking "How high is up?" This particular issue necessarily will have to be resolved on a case-by-case basis – and this is not such a case.

C. The Fear and Uncertainty Inherent in Random Testing.

Of course, the heavy feather that tipped the scales of justice in favor of finding that the City of Mesa's random, suspicionless and warrantless urinalysis drug testing program was a violation of the Fourth Amendment was the fear and apprehension that such a program creates. It is the equivalent of the "knock on the door in the middle of the night" favored by tyrants throughout history. *See United States v. Smith*, 340 F. Supp. 1023, 1029 (D. Conn. 1972) ("A knock at the door is more alarming in the middle of the night, and it is no less so because the officer knocking has a search warrant.").

This Court has held that, where drug testing is random, and is performed with no advance notice to those being forced to provide samples of their bodily fluids to the government, there is a potential for the "'unsettling show of authority' that may be associated with unexpected intrusions on privacy." *Von Raab*, 489 U.S. at 672 n. 2 (quoting *Delaware*

v. Prouse, 440 U.S. 648, 657 (1979)). After all, a government employee reasonably might "expect not to be subjected to a continuous and unrelenting government scrutiny that exposes the employee to unannounced testing at virtually any time." *Anchorage Police Dep't Employees Ass'n v. Municipality of Anchorage*, 24 P.3d 547, 557 (Alaska 2001). This type of situation presents the sort of "arbitrary and invasive acts by officers of the Government or those acting at their direction" that the Fourth Amendment was enacted to prevent. *Skinner*, 489 U.S. at 613-14.

The Arizona Supreme Court concluded that the "very nature of random, suspicionless searches precludes any advance notification and subjects employees to continuous government scrutiny." *Petersen v. City of Mesa*, 207 Ariz. 35, 43, 83 P.3d 35, 43 (2004). The extra element of fear and uncertainty inherent in such a random drug testing program, coupled with the expectations of privacy enjoyed by every American citizen, and the lack of any rumor, hint or history of drug abuse in this fire department, were enough to convince the Arizona Supreme Court that the random drug testing program was crafted and imposed in violation of the Fourth Amendment.

II. THERE IS NO CONFLICT WITH FEDERAL LAWS AND RULES.

The Arizona Supreme Court's decision does not conflict with any of the several federal statutes, rules and regulations that purportedly require the City of Mesa to perform random, suspicionless, warrantless drug testing of certain specified classes of municipal employees. Such employees include such seemingly innocuous workers as solid waste equipment operators, street and park maintenance personnel, and certain

mechanics. It is true that the case before the Arizona Supreme Court only concerned municipal firefighters, who are not yet victims of the federal government's apparently expanding crusade to test every public employee in America. However, if the dauntless federal crusade to force more and more of our citizens to submit to such tests continues, the testing program will eventually encompass every human being in our nation.

The City of Mesa's argument that it is federally required to conduct random, warrantless, suspicionless testing of certain of its employees – but that it cannot conduct such freewheeling, unbridled testing of the city firefighters – misses the point. After all, as a theoretical matter since the ratification of the United States Constitution – and as a practical matter since 1865 – federal law governs state law, controlling even the Arizona Supreme Court. That is, there is no longer any nullification doctrine.

If the federal government chooses to pass laws and create regulations mandating unconstitutional drug testing, no state supreme court can nullify that pernicious practice. Naturally, the City of Mesa can, and should, strive to protect the rights and privacy of its employees by challenging all such insidious laws and regulations *in federal court*. If the City of Mesa has decided simply to abandon the privacy rights of its employees and to decline to challenge such matters in federal court, it can hardly cite to that ignoble decision as a reason to ignore the Arizona Supreme Court's determination to invalidate a random drug testing scheme that is patently unconstitutional.

Indeed, based upon the number of cities and organizations that have stated their intent to file amicus curiae

briefs, there is considerable fear and concern on their part that this Court will both heartily approve the reasoning of the Arizona Supreme Court and apply that reasoning to all government employers throughout the nation. That would indeed be a way to allay the City of Mesa's worry that it has to test some of its municipal employees but not firefighters – namely, cease federally-mandated testing of all of the City of Mesa's employees. Depending on the breadth of this Court's treatment of this case, that is a result that is certainly both proper and attainable.

III. THIS COURT SHOULD BROADLY APPLY THE ARIZONA SUPREME COURT'S OPINION.

Drug abuse is terrible. If alcohol is included as a drug, this is a problem that our nation has actively confronted and fought, with varying levels of enthusiasm and success, for well over a century. (The Prohibition Era is a good example of zeal and failure, for that matter.) However, the apparently endless fight against drug abuse is not an invitation or occasion to invade the privacy and liberty rights of apparently law-abiding citizens, or to create any exclusion to the Fourth Amendment's protections. "There is no drug exception to the Constitution, any more than there is a communism exception or an exception for other real or imagined sources of domestic unrest." *Skinner*, 489 U.S. at 641 (Marshall, J., dissenting).

The simple fact is that protection of constitutional rights is always costly. Every time an assuredly guilty criminal suspect is released because of a violation of constitutional rights, society pays a price. Every time vicious opinions and filthy images are disseminated in public, society pays a price. Every time the government pays fair market value

compensation to condemn critically needed property, society pays a price. That is the inevitable cost of a Constitution that, unlike many constitutions around the world, actually and actively guarantees certain rights to the people of the United States of America. Indeed, the Fourth Amendment itself imposes a cost, since it bars the government from conducting general, warrantless searches whenever it seems expedient. Fortunately for our republic, "the Fourth Amendment is the keystone that holds up the arch of our Bill of Rights which in turn is the unique contribution of our founding fathers to [a] system of government [that] has now survived longer than any other representative government in the world." *United States v. Gould*, 364 F.3d 578, 605 (5th Cir. 2004) (DeMoss, C.J., dissenting).

It may be that the Arizona Supreme Court's opinion will ultimately serve as the basis for striking down other laws, rules and regulations forcing the random, suspicionless, warrantless testing of government employees and other persons in the City of Mesa, in Arizona and across the United States. That is not something to fear. On the contrary, it is a result devoutly to be wished. Indeed, "perhaps no greater public interest exists than protecting a citizen's rights under the constitution." *Legal Aid Soc. of Hawaii v. Legal Services Corp.*, 961 F. Supp. 1402, 1419 (D. Hawaii 1997). The Arizona Supreme Court has, as it has traditionally done, served that public interest very well.

CONCLUSION

For the foregoing reasons, Respondent respectfully recommends that this Court grant the Petition for Writ of Certiorari, for the purpose of affirming the Arizona Supreme Court's opinion and crafting an opinion by this Court that

will restrict the ability of the City of Mesa, and any other American government, from imposing random, suspicionless, warrantless drug testing programs in the absence of any history of drug abuse, and in the absence of an immediate and compelling need based on a clearly articulated, real and identifiable danger.

This Court's opinions on random, suspicionless drug testing have been so misconstrued by many lower courts that "special needs" and "safety sensitive" have come to mean "test whomever you want, whenever you want." This case is a chance to rein in those federal and state courts, and to clarify the limits that the Fourth Amendment places on warrantless, random and suspicionless drug testing of adult public employees.

In the event that this Court does not want to address these issues now, no recommendation on what to do is really needed, other than that the Court then should deny the Petition for Writ of Certiorari and remand this matter for further proceedings in the courts of the State of Arizona.

Respectfully submitted,

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